No. 85-1277

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE NATIONAL HEMOPHILIA FOUNDATION, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS AND THE AMERICAN DIABETES ASSOCIATION AS AMICI CURIAE

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September 19, 1986

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QUESTIONS PRESENTED

1. Whether the record supports the holding of the court of appeals that Gene Arline is "handicapped" within the meaning of the Rehabilitation Act?

2. Whether persons who allege that they have been *incorrectly* regarded as having a handicap that is dangerously communicable in the workplace should be precluded as a matter of law from being "otherwise qualified" for the job of elementary school teacher?

3. Whether the doctrine of reasonable accommodation encompasses modifications in an employer's program such as job reassignment that do not so fundamentally alter the nature of the program as to compromise its essential nature?

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INTEREST OF AMICI

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES (ARC) is a national voluntary organization of parents, families, friends, and persons with retardation that since its founding in 1950 has defended the rights and interests of persons with retardation. The Association is organized into over 1,300 state and local

chapters. Many former and present residents of segregated retardation institutions, as a result of their unnecessary confinement in dangerous environments, have acquired such conditions as hepatitis B, which are not communicable by casual contact. ARC's interest here is to preserve the integrity of Judge Newman's persuasive opinion for the court of appeals in *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979), construing Section 504 to prohibit the exclusion of persons with retardation who were hepatitis B carriers from integrated educational programs in the public schools, on the basis that the school board there failed to show a real risk of communicability. That decision has been assiduously followed by other state and federal courts and by local school boards throughout the nation. Unless the decision of the court of appeals here is affirmed, the well-reasoned *Carey* decision may be placed in jeopardy, as may be the right of thousands of formerly and currently institutionalized children to attend integrated educational programs.

THE NATIONAL HEMOPHILIA FOUNDATION (NHF) is the only organization in the United States exclusively devoted to improving the welfare of all persons affected by hemophilia and related bleeding conditions so that each can fulfill their individual potential. Serving over 20,000 persons nationwide with hemophilia and related conditions, their families, fifty local chapters, and over 100 hemophilia treatment centers, NHF provides and supports: research; patient, public and professional education; and patient, family and community services. Hemophilia is caused by the inactivity of one of the blood proteins necessary for clotting. If internal bleeding is not treated by infusing a clotting factor derived from human blood, permanent damage, especially to joints, can result. Because of their frequent use of clotting factor, those with hemophilia are at greater risk of acquiring a

variety of bloodborne viruses that may cause such conditions as hepatitis and AIDS, neither of which is communicable by casual contact. Persons with hemophilia historically have experienced discrimination based on the unfounded belief that they can bleed to death from minor external cuts and scratches. NHF is concerned that, unless the decision of the court of appeals is affirmed, new discrimination will occur based on equally unfounded fears of communicability.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is the principal organization in the United States for professionals providing habilitative, educational and vocational services to all individuals with severe disabilities. TASH has more than five thousand members including parents, educators, therapists, doctors and other professionals, and handicapped consumers. The Association was founded in 1974 to implement the integration imperative of Section 504 and of the Education of the Handicapped Act, 20 U.S.C. § 1401, and to insure the provision of educational and habilitative services for severely handicapped persons, many of whom would be placed at risk of being excluded from those services if the decision of the court of appeals is not affirmed.

THE AMERICAN DIABETES ASSOCIATION (ADA) has over 800 chapters and affiliates and more than 220,000 members nationwide, including physicians, research scientists, nurses, dieticians, educators and consumers. ADA's purpose is to promote research and to improve the well-being of people with diabetes and their families. Despite the fact that over eleven million Americans have diabetes, the condition is widely misunderstood. Inaccurate perceptions of diabetes and unfounded fears and stereotypes concerning its manifestations often give rise to employment discrimination that may not be cognizable under Section 504 unless the decision of the court of appeals is affirmed.

SUMMARY OF ARGUMENT

1. The Court has granted certiorari on intensely factual questions. The first question, whether Gene Arline is "handicapped" within the meaning of the Rehabilitation Act, surely can be answered on this record. The district court determined that there was "[n]o question that she suffers a handicap," and the court of appeals ruled that she was handicapped since her condition could "significantly impair respiratory functions as well as other major body systems." Discriminatory treatment of persons with such conditions is cognizable under Section 504 and its implementing regulation, which "covers all types of physical and mental impairments."

2. The second question, whether Gene Arline is precluded from being qualified, or, conversely, whether she has been subjected to discrimination, is a factual question that is not susceptible to a decision on this record. Of course, no one here disputes that an employer may exclude, under the doctrine of "business necessity," any employee whose condition jeopardizes the health or safety of other employees or program beneficiaries. No such determination regarding Gene Arline was ever made by the district court, however, and the employer must be held to its burden — a burden well-settled by the cases of this Court — of establishing that proposition. The Court can provide important guidance regarding the proper framework to be followed in adjudicating claims such as respondent's by clarifying that the issue is not whether employers *can* exclude, but whether such exclusion must be justified by proof of facts in the specific case rather than by generalized, unsubstantiated fear. Indeed, insistence upon respect for sound, fact-based judgments from qualified state professionals enforcing the public health laws is exactly what Section 504 demands. Under the construction urged by petitioners and by the Solicitor General, Section 504 would not apply to this entire category of cases, no matter how irrational the

circumstances of exclusion, and employers would be permitted in unfettered fashion to exclude handicapped persons on the flimsiest of bases: the mere "belief that an individual is contagious — *whether reasonable or not*. . . ." Brief for the United States as Amicus Curiae 22-23 (emphasis added).

The consistent, contemporaneous, longstanding construction of Section 504 by the responsible enforcement agency explicitly incorporates well-established employment discrimination law that once a member of a protected group establishes that a practice has a discriminatory impact on that group, the burden shifts to the employer to show, on an individual basis, that its criteria are job-related. Since tuberculosis varies considerably from individual to individual in terms of its symptoms, its susceptibility to treatment, and its transmissibility, since the district court made no specific findings about Mrs. Arline's condition, and in view of the stigma, fear and prejudice historically imposed upon persons with tuberculosis, the Court should remand for an individualized determination of her qualifications.

3. The doctrine of reasonable accommodation may, depending on the circumstances, encompass such modifications in an employer's program as the reassignment of jobs, especially since such action may in any given case prove to be the simplest, least expensive, and most effective method of accommodating an employee's handicap. So long as the accommodation does not amount to such a "fundamental alteration in the nature of a program" that it would "compromis[e] the essential nature" of that program, *Alexander v. Choate*, 105 S.Ct. 712, 720 (1985), enforcement agencies and courts of equity are to be provided "substantial leeway," *id.* 723 n.24, in fashioning sensible accommodations that will enable handicapped employees to pursue their chosen professions.

ARGUMENT

I. The Record Supports the Holding of the Court of Appeals that Gene Arline Is "Handicapped" Within the Meaning of the Rehabilitation Act.

Section 7(7) of the Rehabilitation Act defines "handicapped individual" for the purpose of Section 504 to include "any person" with an "impairment which substantially limits one or more of such person's major life activities" or with "a record" or who is "regarded as having such an impairment." 29 U.S.C. §706(7)(B). The statute requires a case-by-case, factual determination of its coverage.

The record fully supports the holding of the court of appeals regarding coverage of Mrs. Arline.[1] The relevant regulation specifically defines the term "impairment" to include "respiratory" conditions such as hers. 45 C.F.R. §84.3(j)(2)(i);[2] *see* J.A. 7 (tuberculosis in most cases has "an effect upon the respiratory system in general").

Moreover, the regulation defines "major life activities" to include such functions as "breathing" and "walking" affected by a handicapping condition. 45 C.F.R. §84.3(j)(2)(ii);[3] *see* J.A. 7 ("Q. And is it the kind of illness which has the potential to limit a major life function such as breathing or walking or something such as that? A. It could, yes."). Mrs. Arline had a record

1. The question before this Court is whether the record supports the holding of the court of appeals, and the finding of the district court, that Mrs. Arline is "handicapped." Whether another finder of fact might rule differently on this record or even whether another case involving tuberculosis might require a different result are questions not before the Court.

2. After the breakup of HEW, the Department of Education recodified an identical regulation at 34 C.F.R. part 104. Since the court of appeals cites to the HEW (now HHS) rule, we shall continue to do the same.

3. This listing is expressly not exclusive since it refers to functions "such as" those listed. *Id.*

of tuberculosis in "an acute form in such a degree that it affected her respiratory system." J.A. 11. The record reveals that her tuberculosis precipitated her hospitalization. *Id.* 11-12. Indeed, the district court explicitly determined that there was "[n]o question that she suffers a handicap, . . . that she suffers or did suffer from this." Pet. App. C-2.[4]

Petitioners, however, challenge a holding the court of appeals never made. The court of appeals did *not* rule that Mrs. Arline's condition was a "handicap" because it was communicable. Rather, the court ruled that it was a "handicap" precisely and solely because it could "significantly impair respiratory functions as well as other major body systems." Pet. App. A-8. The question whether her condition *also* was or was regarded as communicable pertains to the legality of the exclusionary practice, *not* to the scope of the class protected by the statute.[5] As the Preamble to the regulation states, "[t]he regulation covers all types of physical and mental impairments." 42 Fed. Reg. 22677 (1977). The statute and its regulation do not limit coverage to all impairments except those that

4. While we do not share the view of the American Medical Association (AMA) that there are sufficient ambiguities on this record to require a remand on the question of the substantiality of the limitation imposed upon Mrs. Arline by her tuberculosis, Brief of the AMA as Amicus Curiae 16, we agree that that would be the appropriate action should the Court so conclude, especially since in any event a remand will be required to adjudicate the "otherwise qualified" issue.

5. There is no reason for the Court to address here the hypothetical posed by petitioners of "an individual suffering from a contagious disease [who] may not necessarily suffer from any physical or mental impairments. . . ." Pet. 14. Whether or not such a hypothetical person is "handicapped" should be decided on another day since Mrs. Arline does have the requisite "impairment" in her respiratory functions that does substantially affect her major life activities.

also are or are regarded as being communicable,[6] or to all handicapped persons except those who are free of any communicable conditions.

II. Persons Who Allege that They Have Been *Incorrectly* Regarded as Having a Handicap that Is Dangerously Communicable in the Workplace Should Not Be Precluded As a Matter of Law from Being "Otherwise Qualified" for the Job of Elementary School Teacher.

Petitioners' argument here, echoed by the United States, is that it has excluded and discriminated against Mrs. Arline not because of her handicap, but because of her communicability. Should the Court decide to address this intensely factual question — to the extent it can, at this stage of the record[7] — we urge it to simply affirm the framework established long ago by the federal regulations enforcing Section 504. Those regulations permit an employer to show that an employee has a condition that would endanger others as an element of job-relatedness, but would not permit, as a matter of law, an employer to simply assert without proof that any particular handicap is capable of communication in the workplace and hence to escape a claim of handicap discrimination. We set forth the regulatory framework and demonstrate that that approach is reasonably related to the purposes of Section 504, has been approved and codified by the Congress, and is completely consistent with and required by the decisions of this Court.

"Qualified handicapped person" is defined by the regulation to mean "[w]ith respect to employment, a

6. The Solicitor General also acknowledges that "[a]n individual who is disabled with an infectious, contagious disease surely may be a 'handicapped individual' within the meaning of the Rehabilitation Act." Brief for the United States As Amicus Curiae 12.

7. We agree with Justice Stevens' dissenting opinion on the granting of certiorari (J.A. 90-91) that certiorari was improvidently granted on the Court's added question.

handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. §84.3(k)(1). The Department of Education construes this rule to place the burden squarely on the employer to demonstrate that any particular job function is "essential."[8] Although the Court's second certiorari question focuses upon the term "otherwise qualified," a unanimous Court recently noted that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the Section [504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped." *Alexander v. Choate*, 105 S.Ct. 712, 720 n.19 (1985). With this admonition in mind, we turn to the regulation's discussion of prohibited employment activities.

A. The Use of Employment Criteria Having a Discriminatory Effect Constitutes a Violation of Section 504 Unless Such Criteria Are Shown by the Employer to Be Job-Related.

Petitioners' "noncommunicability" employment criterion at first blush appears to be eminently reasonable, even responsible. The question of "discrimination" arises only if that criterion is improperly utilized to exclude handicapped persons with such conditions as hepatitis or AIDS that can only be communicated via activities

8. Office for Civil Rights, U. S. Department of Education, OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973, at 120 (1981) [*hereafter cited as* Department of Education Handbook] (amici are contemporaneously depositing nine copies of the Department of Education Handbook with the Clerk of the Court and are providing it to the parties). The Department of Education Handbook was officially "Reviewed and Approved for Use by the Department of Education" and "constitutes the legal framework for Section 504" utilized by that agency. *Id.* cover page, 3.

that normally do not occur in the workplace (*e.g.*, through blood transfusions or sexual intercourse), or such conditions as the forms of tuberculosis that are rendered noncommunicable through a medication regimen. The Secretary's construction[9] of Section 504 requires

9. "[T]hese [1977] regulations [are] an important source of guidance on the meaning of §504," *Alexander v. Choate*, 105 S.Ct. at 722 n. 24. Unlike the §504 rule at issue in *Bowen v. American Hosp. Ass'n*, 106 S.Ct. 2101, 2122 (1986), they constitute the longstanding, contemporaneous and consistent construction of the Secretary, and were unquestionably intended by the Congress, *see* S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974), which directed that the Secretary of HEW assume the lead role in implementing Section 504 and acknowledged that agency's expertise and "experience in dealing with handicapped persons and with the elimination of discrimination in other areas," *id.* 40; *see also Rehabilitation Act Amendments of 1974*, Hearings Before the Subcomm. on the Handicapped of the Comm. on Labor & Pub. Welfare, U. S. Senate, 93d Cong., 2d Sess. 224 (1974); Brief for the United States 20 & n.10, *University of Tex. v. Camenisch* (No. 80-317) (criticizing as factually inaccurate the Court's assertion in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979), that the Secretary had altered his position that rules to enforce §504 were required).

Moreover, when the Congress substantially amended the Rehabilitation Act in 1978, it not only acquiesced in the Secretary's construction, *compare Bob Jones Univ. v. United States*, 461 U.S. 574, 599-602 (1983), but expressly "intended to codify the regulations of the Department of HEW governing enforcement of 504," *Conrail v. Darrone*, 104 S.Ct. at 1255 & n.15 (citing 29 U.S.C. §794a(a)(2) and S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978)); *accord, Alexander v. Choate*, 105 S.Ct. at 722 n.24. Aside from §794a(a)(2), several other provisions of the 1978 amendments substantiate Congress' approval of the Secretary's 1977 construction. 29 U.S.C. §794c (establishing an interagency council to insure uniform "implementation and enforcement" of §504, including "the regulations prescribed thereunder"); *id.* §706(7)) (excluding for the purposes of employment those whose "current use of alcohol or drugs prevents such individual from performing the duties of the job in question or . . . would constitute a direct threat to property or the safety of others," in order to alleviate the concern of some members

nothing more — and nothing less — than the proper application of proper employment criteria. Thus, petitioners' practice unquestionably fits within the regulation's provision regarding "criteria . . . that have the effect" of excluding handicapped persons or subjecting them to discrimination. 45 C.F.R. 84.4(b)(4)(i). As the employment subpart of the rule specifies, employers "may not make use of any . . . selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: the . . . selection criterion, as used by the [employer], is shown to be job-related for the position in question." *Id.* §84.13(a)(1). According to the Secretary's Section-by-Section Analysis of the rule,[10] this provision simply

of Congress about the scope of the 1977 HEW employment regulation); *id.* §792(d)(3)(authorizing the Architectural and Transportation Barriers Compliance Board to "provide appropriate technical assistance to any . . . entity, affected by regulations" under §504); *id.* 794(b)(3) (authorizing "financial assistance . . . for the purpose of removing architectural, transportation, and communication barriers" to aid compliance with the 1977 HEW regulation); *id.* §794a(b) (authorizing attorneys' fees awards for prevailing handicapped plaintiffs, to encourage private suits to enforce the 1977 HEW regulation, the provision's sponsor stated, 123 Cong. Rec. 27821 (1977) (Rep. Koch)).

Where as here "[t]he responsible congressional committees participated in their formulation, and both these committees and Congress itself endorsed the[se] regulations in their final form," *Conrail*, 104 S.Ct. at 1255, these "regulations particularly merit deference in the present case," *ibid.*, and a court "does not simply impose its construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

10. The "analysis of the regulation . . . describes the basis and purpose of each section." 42 Fed. Reg. 22677 (1977). Such an analysis, issued by the Secretary who promulgated the regulations and was charged with administration of the statutes, is entitled to substantial deference. *Bowles v. Seminole Rock & Sand Co. v. Milholin*, 444 U.S. 555, 556 (1980). The Court relied upon the Secretary's Section-by-Section Analysis in *Southeastern Community College v. Davis*, 442 U.S. at 406-07 & n.7, and in *Alexander v. Choate*, 105

enforces "the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)." 42 Fed. Reg. 22688 (1977). Thus, the explicit intent of the Secretary was to apply the *Griggs* Title VII standard to Section 504 employment cases.[11]

In *Griggs* the Court acknowledged the fundamental principle that "Congress did not intend by Title VII to guarantee a job to every person regardless of qualifications." Rather, Chief Justice Burger wrote, "what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial *or other impermissible* classification." 401 U.S. at 430-31 (emphasis added).

Section 504, like Title VII, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes" or handicapped persons "cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. Under the *Griggs* standard, incorporated by the Secretary, "good intent or absence of

NOTES *(Continued)*

S.Ct. at 723 n.26; *see also Nelson v. Thornburgh*, 567 F.Supp. 369, 380 (E.D. Pa. 1983), aff'd, 732 F.2d 147 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 955 (1985).

11. The Secretary's application of this standard is especially appropriate in view of Section 504's heritage as part of the "general corpus of discrimination law," *New York St. Ass'n of Retarded Children v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979), and this Court's acknowledgment of that heritage in *Alexander v. Choate*, 105 S.Ct. at 716-19 & nn.7, 11, 13. "We presume that this general framework was familiar to Congress when it enacted §504." *Bowen v. American Hosp. Ass'n*, 106 S.Ct. at 2113, citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). *See also City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3256-57 (1985).

discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432. *Accord, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23, 425 (1975). Thus, according to the Secretary's Section-by-Section Analysis, under *Griggs*, and under the regulation, "once it is shown that an employment test substantially limits the opportunities of handicapped persons, *the employer* must show the test to be job-related." 42 Fed. Reg. 22689 (1977)(emphasis added).

Moreover, Section 504 must be read in conjunction with the "broad aims" of the statute of which it is a part. *Albemarle Paper Co. v. Moody*, 422 U.S. at 417-25. The Congressional Declaration of Purpose for the Rehabilitation Act is to "implement . . . the guarantee of equal opportunity" for handicapped persons. 29 U.S.C. §701. As under Title VII, "[w]hen an employer uses a non-job-related barrier" to deny a handicapped person employment, "and that barrier has a significant adverse effect" on particular handicapped persons, then the excluded employee "has been deprived of an employment *opportunity*" because of her handicap. *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (emphasis by the Court); *accord, Griggs v. Duke Power Co.*, 401 U.S. at 430, 431 (explicitly focusing on employment "practices, procedures, or tests" that deny equal employment "opportunity").

"Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet the 'burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' " *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), *quoting Griggs*, 401 U.S. at 432. Indeed, petitioners apparently concur at least in the assignment of the burden of proof. Pet. Brief 39 ("*the employer must demonstrate* that the articulated risk is real") (emphasis added).

Just as blacks have successfully challenged under Title VII the discriminatory effects of practices excluding — on the "neutral" basis of fear of health risks — persons with pseudofolliculitis barbae, even in the face of employers' claims that such risks are governed by state and municipal health codes, *see, e.g., Richardson v. Quick Trip Corp.*, 591 F.Supp. 1151, 1154-55 (S.D. Iowa, 1984); EEOC Dec. No. 83-17, 33 F.E.P. Cases 1884, 1886 & n. 6 (Sept. 2, 1983), so too must handicapped persons, under the regulation, be permitted to challenge practices like petitioners'. Otherwise, employers also would be permitted under Title VII to adopt blanket policies excluding Haitians or blacks based upon some "good faith" fear that the members of those national origin or racial groups are more likely to have acquired AIDS or other conditions that are irrationally feared[12] and that are not communicable by casual contact.

Enactment of Section 504 represents a judgment by the Congress about handicapped persons like that rendered about other minorities when it enacted Title VII that characteristics "resulting from forces beyond their control not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973).[13] Any different construction of Section 504 would permit an employer to refuse to hire handicapped workers for any number of "good faith," "neutral," but

12. It is long-settled law that unfounded fears cannot be a proper basis for exclusion. *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. at 3259-60; *id.* 3262 (Stevens, J., concurring); *id.* 3266-68 (Marshall, J., concurring); *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984).

13. It is noteworthy that Section 504 "was enacted by Congress within a few months after the Court's decision in *McDonnell Douglas*." *New York St. Ass'n of Retarded Children v. Carey*, 612 F.2d at 649 n. 5.

not demonstrably job-related reasons, *e.g.*, to take one instance cited in Section 504's legislative history, that their very "physical appearance would have a 'nauseating effect' " on other workers. 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik).[14] But Section 504 "constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance shall *be operated* without discrimination on the basis of handicap." S.Rep. No. 93-1297, 93d Cong., 2d Sess. 39 (1974) (emphasis added).[15]

Statutory prohibitions of employment discrimination like Section 504 and Title VII "involv[e] a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution." *Washington v. Davis*, 426 U.S. 229, 247 (1976). "Requiring governmental agencies to rebut in court a *prima facie* case of discrimination against the handicapped does not mean that the expertise of responsible administrators is to be denigrated." But such administrators must "demonstrate that the health hazard posed by [communicability] was anything more than a remote possibility." *New York*

14. Congressman Vanik's discussion arose in the context of his criticism of a state court decision upholding the exclusion of a cerebral palsied child from public school despite his being "academically competent" and nonthreatening to other students, since the teacher felt the handicapped student's "physical appearance would have a 'nauseating effect' on his classmates." 117 Cong. Rec. 45974 (1971). It was such practices, Congressman Vanik said, that Section 504 was meant to rectify. *Id.* The legislative history of Section 504 bearing upon this issue is more fully set forth in the Brief of Senator Alan Cranston, *et al.*, as Amici Curiae.

15. This Court consistently has relied upon S. Rep. No. 93-1297 as an authoritative exposition of the Congressional intent under Section 504. *See Alexander v. Choate*, 105 S.Ct. at 717 n.7, 723 n.24, 724 nn.27, 30; *Community Television v. Gottfried*, 459 U.S. 498, 509 (1983); *Conrail v. Darrone*, 104 S.Ct. 1248, 1225 n.15 (1984).

State Ass'n for Retarded Children v. Carey, 612 F.2d at 650.[16]

The Solicitor General asserts that a policy like petitioners' cannot be discriminatory so long as it is not a "pretext" for intentional discrimination. Brief for the United States As Amicus Curiae 11, *citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This ignores the well-settled framework of the cases requiring employers in discriminatory impact cases to show that the rationale for practices having a discriminatory effect is, demonstrably, job-related. Only *if* — and *after* — the employer successfully fulfills that burden is the employee to be given a final opportunity in rebuttal to establish pretext. *E.g., Connecticut v. Teal*, 457 U.S. 440, 447 (1982). As the *Burdine* Court itself recognized, "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 253 n. 5. "In a disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential, the purpose compelling." *Williams v. Colorado Springs School District*, 641 F.2d 835, 842 (10th Cir. 1981); *accord*, *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 752-53 & n.2 (5th Cir. 1981) (Vance, *J.*).

The Solicitor General simplistically rejects the entire disparate impact concept as going beyond the "boundless notion that all disparate-impact showings constitute prima facie cases under §504." Brief for the United States As Amicus Curiae 21-22 n.19, *quoting Alexander v. Choate*, 105 S.Ct. at 720. However, in *Choate*, the

16. As the Solicitor General acknowledges, Brief for United States as Amicus Curiae 22 n. 20, *citing New York St. Ass'n for Retarded Children v. Carey*, 612 F.2d at 649, regardless of how the Court decides this case, it would violate §504 to apply an exclusionary policy based on communicability to retarded persons but not to others.

unanimous Court indicated with particularity precisely and solely which actions it deemed out of Section 504's bounds: Those modifications in the nature of an employer's program so "fundamental" or "substantial" as to vitiate "the integrity of their programs." *Choate*, 105 S.Ct. at 720. Contrary to the United States' unfair characterization of *Choate*, that Court acknowledged that the Congress enacted Section 504 against the background of "nearly a decade of experience [that] had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII," and that "Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate impact discrimination." *Choate*, 105 S.Ct. at 718 n.11. As Justice White wrote in *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 592 (1983), the language of Title VI — tracked verbatim in Section 504— "is surely subject to the construction given the anti-discrimination proscription of Title VII in *Griggs* . . . at least to the extent of permitting, if not requiring, regulations that reach disparate impact discrimination."

Moreover, as *Choate* explicitly recognized, the legislative history of Section 504 "listed, among the instances of discrimination that the section [504] would prohibit, the use of . . . the discriminatory effect of job qualification . . . procedures." *Choate*, 105 S.Ct. at 719, *quoting* 118 Cong. Rec. 525-26 (1972) (statement of §504's co-sponsor, Sen. Humphrey, whose remarks are "a primary signpost on the road toward interpreting the legislative history of §504," *Choate*, 105 S.Ct. at 718 n.13).

No one in this case suggests that employers are prohibited from protecting third parties from communicable conditions, only that such stark — but sometimes necessary — employment barriers as that adopted by petitioners here may not be utilized "without meaningful study of [their] relationship to job-performance ability,"

Griggs, 401 U.S. at 431, and that the burden be placed squarely on the employer to show that its policy is "demonstrably a reasonable measure of job performance," *id.* at 436.

B. A Bona Fide Occupational Qualification Defense Is Not Permissible Here Since Case-by-Case Determinations Are Required to Determine Whether Any Individual with Tuberculosis May Justifiably be Excluded from Employment for Health or Safety Reasons.

Section 504 requires, as its centerpiece, that an employer make a case-by-case determination of qualifications for each handicapped person before deciding whether that individual is a "qualified handicapped person." *E.g., Strathie v. Department of Transportation*, 716 F.2d 227, 231-34 & n.7 (3d Cir. 1983). Like Title VII, Section 504's "focus on the individual is unambiguous." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

However, the Court-proposed second question appears to request briefing of the question whether there might be circumstances in which individual determinations are *not* required, *i.e.*, whether an entire class of handicapped persons may, in the Court's words (J.A. 90), be "precluded from being 'otherwise qualified' " for a given occupation by virtue of the mere existence of a handicap. This general concept is of course well-known in the areas of age and gender employment discrimination as the "bona fide occupational qualification" (BFOQ) defense. We concur with the American Medical Association (AMA) that the Court ought to proceed with the utmost caution (Brief of the AMA as Amicus Curiae 10) before excluding any entire category of handicapped persons from the coverage of Section 504. As the Connecticut Supreme Court has ruled, "Blanket exclusions,

no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices." *Connecticut Institute for the Blind v. Connecticut Commission on Human Rights*, 176 Conn. 88, 405 A.2d 618, 621 (1978).

The Secretary, in his Section-by-Section Analysis of the regulation, touched upon this issue in his discussion of the meaning of the phrase "otherwise qualified," explaining that Section 504 would not prohibit, for example, a bus company from adopting a rule barring all blind persons from applying for jobs as bus drivers. 42 Fed. Reg. 22686, ¶5 (1977). By recognizing the legitimacy of such a practice, the Secretary may have meant to suggest the possible existence in certain circumstances of a defense akin to a BFOQ. But the Department of Education has indicated that to the extent any such defense may be cognizable under Section 504, it must be "a limited one." Department of Education Handbook, *supra* note 8, at 150. Thus, while "[t]he language 'otherwise qualified' implies that differentiating on the basis of handicap is not per se violative of Section 504 if the handicap goes to the essence of the job," such a blanket defense "would have to be narrowly construed in order to be consistent with the statute" and would apply *"only to those situations in which the employer could demonstrate that the BFOQ would not preclude any handicapped individual from employment who could 'otherwise qualify'* (i.e., who, with reasonable accommodation could perform the essential functions of the job) *if individually tested."* *Id.* at 150-51 (emphasis added by the Department of Education).

Even under the Civil Rights Act of 1964 and under the Age Discrimination in Employment Act of 1967, both of which, unlike Section 504, expressly codified a BFOQ

defense,[17] such a blanket exclusion "was in fact meant to be an extremely narrow exception to the general prohibition" of discrimination. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). The exception is extremely narrow even where safety is of critical importance — that was this Court's holding in *Western Airlines v. Criswell*, 105 S.Ct. 2743 (1985). Requiring individualized determinations would "not ignore the public interest in safety" since, as the Court noted (*id.* 2754):

> "When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case."

Moreover, the Court noted that "[s]uch considerations of course are only relevant at the margin of a close case, and do not relieve *the employer* from *its* burden of establishing the BFOQ by the preponderance of credible evidence." *Id.* at 2754 n.29 (emphasis added). But, the Court observed, there is a built-in protection in safety cases, for "[w]hen the employer's argument has a credible basis in the record, it is difficult to believe" that the finder of fact "would not defer in a close case to the [employer's] judgment." *Id.* at 2754.

Congress intended from the beginning that the requirement of job-relatedness would satisfy all of the same concerns raised by the BFOQ defense. As this

17. *See* 42 U.S.C. §2000e-2(e)(1); 29 U.S.C. §623(f)(1); *cf. Conrail v. Darrone*, 104 S.Ct. at 1253 (statutory exclusions under the Civil Rights Act of 1964 inapplicable where "§504 itself contains no such limitation").

Court observed in *Alexander v. Choate*, 105 S.Ct. at 718 n.13, Section 504 had its origins in companion bills introduced by Representative Vanik and Senators Humphrey and Percy. H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45945 (1971); S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525-526 (1972). Those bills would have amended Title VI to bar discrimination against a person on the basis of a handicap "unless lack of such physical or mental handicap is a bona fide qualification reasonably necessary to the normal operation of such program or activity." 118 Cong. Rec. 526 (1972); *see also id.* at 2999 (statement of Rep. Vanik). Section 504 embodies the intent of this predecessor bill. *Alexander v. Choate*, 105 S.Ct. at 718 n.15; *see* 119 Cong. Rec. 6145 (1973) (statement of Sen. Humphrey); *id.* at 7114 (remarks of Rep. Vanik). Discussing this historical origin of Section 504 in a recent brief before this Court, the Solicitor General, representing the Secretary of HHS, agreed that "[t]he phrase 'otherwise qualified' in Section 504 therefore should be understood to refer to a qualification reasonably necessary to the operation of the federally assisted program." Brief for the Petitioner 22 n.10, *Bowen v. American Hospital Ass'n*, No. 84-1259; *see also* 124 Cong. Rec. 30322-30325 (1978)(debate on 1978 amendment to 29 U.S.C. 706(7)); 124 Cong. Rec. 37509-37510 (remarks of Sen. Williams); *see generally supra* notes 11, 14.

Application of this well-settled law to this case indicates that a blanket rule permitting the exclusion of all persons with a record of tuberculosis should not be sanctioned. As the AMA indicates, tuberculosis *varies considerably* from individual to individual in terms of its symptoms, its susceptibility to treatment, and its transmissibility. Brief of the AMA as Amicus Curiae 5-7. Thus, as Florida state laws recognize, "*individualized* decisions should be made about the risk posed to others by a person with tuberculosis." *Id.* 7 (emphasis added). State health and safety codes "do not establish blanket

rules concerning the appropriate response to communicable diseases." *Id.* Section 504 demands that the standards established by such codes, and the sound, fact-based judgments of professionals enforcing those codes, be respected. We concur with the AMA that since "[t]he district court . . . made no specific findings about respondent's medical history or condition (*id.* 8), the Court "should refrain from issuing a blanket rule about whether persons suffering from infectious tuberculosis are 'otherwise qualified' to serve as elementary school teachers" (*id.* 11). *Accord*, Brief of the American Public Health Ass'n, *et al.*, as Amici Curiae. Especially in view of the stigma, and the prejudice, and the cruel myths historically perpetrated about persons with tuberculosis,[18] Section 504 demands that the utmost care be taken

18. Susan Sontag in her *Illness as Metaphor* (1978), has collected the literature on tuberculosis, a condition that historically "was thought to be an insidious, implacable theft of a life." Sontag writes that "[c]ontact with someone afflicted with a disease regarded as a mysterious malevolency inevitably feels like a trespass; worse, like the violation of a taboo. The very names of such diseases are felt to have a magic power. In Stendhal's *Armand* (1827), the hero's mother refuses to say 'tuberculosis,' for fear that pronouncing the word will hasten the course of her son's malady." The solution, Sontag wisely states, is "to rectify the conception of the disease, to demythicize it." Otherwise, "[t]he metaphors attached to TB . . . imply living processes of a particularly resonant and horrid kind."

"TB was — still is — thought to produce spells of euphoria, increased appetite, exacerbated sexual desire." Conversely, "TB is often imagined as a disease of poverty and deprivation — of thin garments, thin bodies, unheated rooms, poor hygiene, inadequate food. The poverty may not be as literal as Mimi's garret in *La Boheme*; the tubercular Marguerite Gautier in *La Dame Aux Camelias* lives in luxury, but inside she is a waif." Indeed, "[n]ineteenth-century literature is stocked with descriptions of almost symptomless, unfrightened, beatific deaths from TB, particularly of young people, such as Little Eva in *Uncle Tom's Cabin*. . . ."

Moreover, "people could believe that TB was inherited . . . and also believe that it revealed something singular about the person afflicted." As Kafka wrote to Felice, "Secretly I don't believe this illness to be tuberculosis . . . but rather a sign of my general bankruptcy." Indeed, tuberculosis has been used as a metaphor for all that is "unqualifiedly and unredeemably wicked. It enormously ups the ante. Hitler, in his first political tract, an anti-Semitic diatribe written in September 1919, accused the Jews of producing 'a racial tuberculosis among nations.' " S. SONTAG, *supra* at 5, 6, 7, 9, 13, 15, 16, 19, 38, 44, 61, 62, 83.

to "ensur[e] that employment decisions about handicapped [persons] are not made as a result of fear, stereotypes or prejudice . . . [by] requir[ing] that recipients make reasonable employment decisions based on reasonable, individualized medical judgments about the nature, degree, and duration of the handicap, if any, caused by the disease and the nature, degree and duration of risk to third parties." Brief of the AMA as Amici Curiae 9.

III. The Doctrine of Reasonable Accommodation Encompasses Modifications in an Employer's Program Such as Job Reassignment that Do Not So Fundamentally Alter the Nature of the Program as to Compromise its Essential Nature.

The Solicitor General erroneously argues that petitioners are not required to offer respondent any different position. Brief for the United States as Amicus Curiae 26-27. Here the "job in question," within the meaning of 45 C.F.R. §84.3(h), is that of being an educator. Indeed, her employment with petitioners did not even require her to teach any particular grade, *id.* 55-56, and there may well be numerous additional positions available at the school board for which Mrs. Arline was qualified that may not even require any substantial contact with students, such as curriculum development or administration, *id.* 59-61. The only remaining question, then, under *Alexander v. Choate*, is whether reassigning Mrs. Arline would amount to such a "fundamental alteration in the nature of [petitioners'] program" that it would "compromis[e] the essential nature" of that program. 105 S.Ct. at

720. The record reveals that it would not since petitioners as a matter of course employed teachers in grades outside their fields of certification, J.A. 56. Petitioners could permissibly have conditioned an offer to teach other students or even adults upon Mrs. Arline's becoming recertified, but they never did so, *see* J.A. 56-57, nor did petitioners even cursorily consider Mrs. Arline for any education positions with diminished opportunities for student contact, *id.* 61.

In an opinion letter dated August 5, 1986, the U. S. Department of HHS ruled that under its Section 504 regulation, the same regulation that governs here, a hospital could be required to accommodate handicapped employees by "transfer to another appropriate position where such transfers are feasible." Office for Civil Rights, HHS, Complaint No. 04-843096, Opinion Letter of August 5, 1986, at 8 (amici are depositing nine copies of this Opinion Letter with the Clerk of the Court and are providing it to the parties). Such an administrative construction by an agency of its own regulation is entitled to conclusive weight so long as it is neither "plainly erroneous" nor "demonstrably irrational." *See, e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276 (1969).

While *Choate* makes clear that there are limits to the accommodation requirement, *e.g.*, petitioners of course would not be required to create a wholly new position just so that Mrs. Arline might remain employed there, *Choate* makes equally clear that enforcement agencies and courts of equity are to be provided "substantial leeway" in fashioning sensible accommodations. 105 S.Ct. at 723 n.24.[19] For this Court to now rule that *any*

19. Such leeway also fits the broad "remedial purpose of the Rehabilitation Act 'to promote and expand employment opportunities' for the handicapped." *Conrail v. Darrone*, 104 S.Ct. at 1255. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." *Id.* 1254 n.13. But, as in *Conrail*, "this decision to limit §504 to the recipients of federal aid does not require us to limit that section still further, as petitioner urges." *Id. See also Lau v. Nichols*, 414 U.S. 563, 567 (1974)(requiring under Title VI that students handicapped by "linguistic deficiencies" be accommodated by transferring them to classes taught in their own language).

job reassignment is precluded as a matter of law under Section 504 might take away what in a given case may prove to be the simplest, least expensive, and most effective vehicle for accommodating handicapped employees, thereby permitting them "meaningful access," *Choate*, 105 S.Ct. 721 & n.21, to professional endeavors, as contemplated by the Rehabilitation Act.[20]

20. *Choate* acknowledged that the very regulation applicable here, 45 C.F.R. §84.12(a), "requiring an employer to make 'reasonable accommodations to the known physical or mental limitations' of a handicapped individual" is "consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." 105 S.Ct. at 721 n.21.

Whether Mrs. Arline is entitled to any relief is not a question involved in this review. As in *Albemarle Paper Co. v. Moody*, 422 U.S. at 413, a remand is appropriate since the equities of Mrs. Arline's case were never reached by either of the courts below.

CONCLUSION

For the foregoing reasons, the holding of the court of appeals should be affirmed.

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September 19, 1986